No. 21374

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROGER LEE GLAVIN, ROBERT LORING CHESNEY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal From the United States District Court
Central District of California.

PETITION FOR REHEARING.

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To the Honorable Judge Koelsch and Judge Browning, Circuit Judges and the Honorable Judge Powell, District Judge, sitting in the above matter for the United States Court of Appeals for the Ninth Circuit:

Appellants respectfully petition for a rehearing in the above case and state:

1. The Apparent Effect of the Decision Herein Is Disregard the Rules of the Supreme Court in the Glasser Case.

A. In the opinion written in this case the Court mentions the case of *Glasser v. United States,* 315 U.S. 60 (1942) which was strongly relied upon by appellants. The court in its decision herein also comments on the remarks which were made by counsel—prior to the commencement of the trial—to the trial court to the effect that *"it appears there may perhaps be a conflict of interest here . . . and he (Mr. Glavin) has indicated that he does not wish me to represent him"* . . . as merely indicating that one of counsel's two clients was dissatisfied and wished to replace him, and this somehow eliminated the situation from the *Glasser* case rule.

Rather than exempt it from the *Glasser* case rule, it brings it squarely within the rule of that case.

In the *Glasser* case, 315 U.S. at page 75, the court stated that there was yet another consideration in the matter, that Glasser wished the benefit of the undivided assistance of counsel of his own choice . . . and *that the desire on the part of an accused should be respected;* that *irrespective of any conflict of interest* the additional burden of representing another party may conceivably impair the counsel's effectiveness.

Also, on page 76 of 315 U.S. in the *Glasser* case. the court pointed out that the right to have the assist-

ance of counsel was too fundamental to allow the courts *to indulge in nice calculations as to the amount of prejudice arising from its denial.* With all due respect to the scholarly presentation of this decision herein, it does appear that this court has indulged in nice calculations as to the amount of prejudice resulting from forcing two defendants to go to trial defended by one attorney when one of the defendants has stated —at the first opportunity available to him—that he did not want to be represented by the counsel and the counsel has stated to the court that the two cannot agree on how the representation of the defendants is to be handled.

The language of the defendant—which was held to be sufficient to warrant the court in appointing separate counsel—in the *Glasser* case was not as positive or as firm and certain as that here before the court. Here, as the court even mentions in its decision, Mr. Glavin had indicated that *he did not wish the counsel to represent him* . . . and this was prior to the commencement of the trial.

B. In the *Glasser* case the court pointed out on page 76 of 315 U.S. that the lower court was advised *"of the possibility that conflicting interests might arise . . ."* and that nevertheless the Court disregarded this . . . which was concluded to be error. In the case here before the court, as pointed out in the decision, it was stated to the trial court before trial, *"it appears there may perhaps be a conflict of interest here,"*. It is urged that this is as strong as the situation in the *Glasser* case . . . and was as far as an attorney, caught in such a situation, could ethically go in advising the court in such a matter.

C. The Court commented that counsel had represented Mr. Glavin for 19 days and suggests that an

earlier approach to the court should have been made. Counsel was the attorney for Mr. Chesney. At the arraignment before the commissioner he included Mr. Glavin at Mr. Chesney's request and appeared the one time in court on June 6th to enter a plea. As was pointed out to this Court on oral argument (in the presence of the U.S. Attorney who handled the matter), it was not until Friday night, before the trial on Monday (which trial was before an assigned trial judge from the State of Washington) that counsel was afforded the opportunity to inspect all of the exhibits proposed to be used and thus it was only on the week-end before trial that counsel was able to confront Mr. Glavin with all of the facts and demand answers and suggest a certain disposition of the case for him and a different one for Mr. Chesney . . . which procedure and proposals Mr. Glavin would not accept and told counsel he did not want him to be his attorney. This was immediately brought to the attention of the trial court at the next court day, the day of trial, the court denied it and in effect Mr. Chesney was denied representation, for the result of the refusal to relieve counsel from representation of Glavin was to keep Mr. Chesney off the stand, even though he had requested to counsel to testify to explain the situation he had gotten caught up in, but having to divide loyalty between two conflicting defendants, counsel could not permit such testimony and at the same time try to represent Mr. Glavin . . . thus, the only thing that was done was to compromise both of the defendants . . . and both were effectively denied the unfettered assistance of counsel.

2. The Effect of the Court's Decision Seems to Place the Burden of Full Disclosure of the Actual Facts of Conflict—Betray the Confidences of the Accused—as a Condition to Establishing Conflict of Interest.

The Court in its decision stated that Counsel did not identify any possible divergence of interest to the trial court . . . inferring that such disclosure was essential to obtaining relief. It was pointed out to the Court in Appellants' briefs that decisions in the State of California, citing Canon 37 of Canons of Professional Ethics of the American Bar Association, had held that it would be improper for an attorney to disclose the facts of such a conflict as this would violate his duty to preserve his client's confidence. Moreover, no where in the *Glasser* decision is there intimated that disclosure of the evidentiary and factual conflicts between two accused represented by one counsel is a requirement for obtaining single representation once the counsel has suggested to the court that there appears to be a conflict.

3. Admission of No Foundation Hearsay Documents Was Error.

The Court comments that Chesney was connected up sufficiently to take the risk in admitting gas tickets and receipt for truck parts over objection. Whatever the court considers as connection there was none aimed at nor tendered as to the hearsay documents which were admitted. The effect of the ruling seems to be that the documents not established to be from Mr. Chesney the accused, by use of a name the same as his name dispensed with the necessity for such connection. This added to the inability of that defendant to have full representation with his interests alone to protect (above those of Mr. Glavin) defeated the basic rights of Mr. Chesney to a fair trial.

4. The "Entrapment" Procedure Was Purely Utilized in a Non-Commission of Crime Situation to Plant Evidence for Trial Use.

The police had the evidence which they utilized Buehler to make a token presentation to Chesney. Mr. Chesney was not at the time committing any crime. If they believed him to be guilty of a felony they had more than adequate time to secure a warrant for his arrest. . . . They knew his location. What then was the purpose of the procedure followed to take evidence from their possession and put it temporarily in his hands except to create an impression to the trier of fact, of guilt of a crime, for which he was not then arrested nor was he then claimed to have been committing? Having to stand mute before the court because his attorney has a divided interest and cannot fully represent him, again in this situation cut off all avenues of fairness of the trial to Mr. Chesney . . . including the refutation of the testimony of Mr. Buehler (who Chesney was after because of a bad check given him by Buehler for $275.00 on November 12, 1965).

For these reasons, it is respectfully urged that this matter be reconsidered and that a full rehearing be granted.

Respectfully submitted,

G. G Baumen,

Attorney for Appellants-Petitioners.

Certificate.

I certify that the foregoing Petition for Rehearing is in my judgment well founded in both fact and law, it is not interposed for purposes of delay and that in opinion of the undersigned the same is meritorious.

G. G. Baumen